



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Deval L. Patrick, Governor ♦ Timothy P. Murray, Lt. Governor ♦ Tina Brooks, Undersecretary

Public Housing Notice: 2009-11

MEMORANDUM

TO: LOCAL HOUSING AUTHORITIES
FROM: AMY SCHECTMAN, ASSOCIATE DIRECTOR, DIVISION OF PUBLIC HOUSING AND RENTAL ASSISTANCE; DEBORAH GODDARD, OFFICE OF THE CHIEF COUNSEL
SUBJECT: REASONABLE ACCOMMODATIONS AND MODIFICATIONS IN STATE-AIDED PUBLIC HOUSING
DATE: JUNE 11, 2009

As you well know, “reasonable accommodations” and “reasonable modifications” are simple concepts but often difficult in execution. Not only does the case-by-case nature of resolving requests for reasonable accommodations/modifications pose challenges, the laws affecting implementation sometimes change, including through statutory amendments, court decisions, and administrative rulemaking or clarification of the rules. We have recently made changes to update some of our documents relating to reasonable accommodations/ modifications, and we are highlighting those changes here for you. In addition, many housing authorities have requested guidance on this topic, and this notice provides that. We plan to follow-up with training sessions to be scheduled soon, but wanted you to have an opportunity to digest the information before those occur.

This Memorandum provides an overview of the key obligations pertaining to reasonable accommodations and modifications in state-aided public housing and of related recent changes to DHCD documents. We have attached copies of the related DHCD documents to the Memorandum. The overview makes reference to Chapter 151B of the Massachusetts General Laws, the federal Fair Housing Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973, which govern our responsibilities with respect to reasonable accommodations and modifications. Links to the full texts of these laws can be found on DHCD’s website under Office of the Chief Counsel. Although this Memorandum specifically addresses state-aided public housing, LHAs are similarly obligated to reasonably accommodate disabled persons in state rental assistance and federal programs. To ensure compliance, LHAs must completely review all applicable state and federal civil laws and accompanying regulations pertaining to non-discrimination and access for persons with disabilities.

Statutory Framework

LHAs are obligated to provide reasonable accommodations and modifications for disabled persons pursuant to a variety of laws, both state and federal law. The terms “disability” and “handicap” vary in definition depending on the statutory, regulatory, or programmatic context, but for reasonable accommodation/modification purposes, they generally mean a physical or mental impairment that substantially limits a major life activity.¹ Although LHAs may inquire, in response to a request for a reasonable accommodation/modification, whether a person is disabled or whether there is a relationship between the disability and the need for the accommodation/modification, LHAs generally may not inquire into the nature or severity of the disability unless for a purpose specifically permitted by law.²

For reference, the term “reasonable accommodation” generally means a change in rules, policies, practices, or services necessary to afford a disabled person(s) an equal opportunity to use and enjoy a dwelling or facility and/or to access government programs, activities, and services. Although statutory language varies, an accommodation is generally not reasonable and does not have to be made if it imposes an undue financial and administrative burden or requires a fundamental alteration in the nature of a program. The determination as to whether an accommodation is reasonable depends on the circumstances at the time of the request, and a request cannot be denied in anticipation that similar requests will be made in the future.

Some examples of reasonable accommodations:

- *Permitting a disabled person to have a service animal in his/her unit (including a “therapy” or “emotional support” animal)*
- *Assigning and reserving a parking space for a disabled person to ameliorate his/her difficulty in accessing the unit*
- *Providing a single-person household a larger unit size due to his/her mobility impairments*
- *Permitting a disabled resident to have a live-in aide*
- *Allowing a disabled resident the opportunity to comply with his/her lease prior to an eviction action*

An accommodation is not required if would pose a direct threat to the health and safety of other individuals or would result in substantial physical damage to the property of others.³ However, the “direct threat” must pose a significant risk that cannot be eliminated by the LHA through a change in

¹ Please note: pursuant to the recent ADA Amendments Act of 2008, the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures. Also, an impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active.

² See HUD’s Fair Housing Act regulations regarding disability inquiries at 24 C.F.R. § 100.202(c).

³ 42 U.S.C. § 3604(f)(9).

policies, practices, or procedures, or by the provision of auxiliary aids or services.⁴ The LHA's assessment must be individualized and based on current medical knowledge or the best available objective evidence.⁵ The LHA must consider the nature, duration, and severity of the risk, the probability that the potential injury will actually occur, and whether changes to policies, practices, or procedures will mitigate the risk.⁶

The term "reasonable modification," sometimes used under the umbrella of "reasonable accommodation" terminology, generally means a physical change, such as to a dwelling unit, building, common or public area, etc., necessary to afford equal opportunity for use and enjoyment by the disabled person(s) and/or to provide access government programs, activities, and services.

Some examples of reasonable modifications:

- *Installing raised numbers which may be read by a sight-impaired person*
- *Installing a door bell which flashes a light for a hearing-impaired person*
- *Lowering a cabinet*
- *Widening a doorway*
- *Installing a grab bar*
- *Ramping a front entrance*⁷

State and Federal Obligations to Provide Reasonable Accommodations and Modifications:

Pursuant to state law as well as certain federal laws, LHAs have duties to provide reasonable modifications. Although similar in many respects to the federal Fair Housing Act⁸, the state Anti-Discrimination law, Massachusetts General Laws Chapter 151B, differs in its requirement that reasonable modifications be made at the expense of the owner. More specifically, reasonable modifications in publicly assisted housing, multiple dwelling housing consisting of 10 or more units, and contiguously located housing of 10 or more units, are to be made at the expense of the owner or other person having the right of ownership.⁹ Modifications that would pose an undue hardship are considered unreasonable.

⁴ 24 C.F.R. § 9.131(b).

⁵ *Boston Housing Authority v. Emmitt Bridgewaters*, 452 Mass. 833 (2009) (citing 24 C.F.R. § 9.131(c)).

⁶ *Id.*

⁷ See M.G.L. c.151B section 4, paragraph 7A.

⁸ Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601 *et seq.*

⁹ See M.G.L. c.151B section 4, paragraph 7A, as well as section 1 for definition of "publicly assisted housing" and other terms. Note that section 4, paragraph 7A provides that ten percent shall be the maximum number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully accessible to persons using a wheelchair.

Furthermore, LHAs are subject to Title II of the Americans with Disabilities Act (ADA) of 1990¹⁰, the regulations for which provide that a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.¹¹ Furthermore, Title II of the ADA requires that "a public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."¹² A public entity is not required to take action that it can demonstrate would result in a fundamental alteration in the nature of the service, program, or activity or would result in undue financial and administrative burdens."¹³

Although not detailed in this Memorandum, it is important to note that Section 504 of the Rehabilitation Act of 1973¹⁴ obligates LHAs that are recipients of federal funds to provide reasonable accommodations/modifications for disabled persons and to operate each existing housing program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by disabled persons.¹⁵

Ensuring Program Access through Existing Facilities

LHAs that determine a modification to an existing facility would be unreasonable in accordance with applicable state and federal law must be able to demonstrate the basis for such a determination. Title II ADA regulations at 28 C.F.R. § 35.150(a)(3) specifically provide that:

In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would

¹⁰ 42 U.S.C. §§ 12101 *et seq.*

¹¹ 28 CFR § 35.130(b)(7).

¹² 28 C.F.R. § 35.150(a).

¹³ 28 C.F.R. § 35.150(a)(3).

¹⁴ 29 U.S.C. § 794.

¹⁵ 24 C.F.R. § 8.11, 8.24.

not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

Moreover, as Title II of the ADA requires LHAs to take actions to ensure disabled persons are able to access its services, programs, and activities, LHAs must have alternative methods for ensuring such access in the event that a requested modification(s) would be unreasonable. For example, if a resident requests that his/her current public housing unit be made accessible, the LHA must determine whether such a request is reasonable. If granting the request would pose an undue financial and administrative burden on the LHA, the LHA must evaluate its ability to provide another accessible unit, or modify another unit, that is as similar as possible to the type and location of the resident's current unit. The LHA's first course of action is to look to their formula funding allocation for monies to cover these costs. If the LHA believes that this funding is insufficient, the LHA should then contact DHCD to see if there are any available modernization funds that would be necessary and appropriate for the modification work. If an accessible unit or reasonably modifiable unit is not available at the time of the request, the LHA should determine whether it could require a resident that is not in need of his/her unit with accessible features to transfer to a different unit. An LHA cannot impose such a transfer requirement if the requirement is not included within the lease, lease amendment, or lease addendum between the LHA and the Tenant in accordance with Section XX of the DHCD Form Lease for Public Housing.

LHAs may not circumvent obligations to provide disabled persons access to a particular program, activity, or service by first offering a different program, activity or service. For example, an LHA should not offer a disabled public housing resident in need of an accessible unit a rental assistance voucher prior to determining whether it can provide the resident access to the public housing program through efforts to locate or create an accessible unit as discussed above.

It is also important to note that an LHA must always, regardless of its accommodation or modification efforts, comply with ALL state AND federal accessibility requirements as they apply to new construction and rehabilitation, including M.G.L. c.151B, M.G.L. c.22 section 13A and the Massachusetts Architectural Access Board regulations at 521 CMR, the Fair Housing Act, the ADA, Section 504 of the Rehabilitation Act of 1973, and the Architectural Barriers Act of 1968.¹⁶

Other Reasonable Accommodation/Modification Procedures and Practices

- LHAs must provide applicants and residents notice of LHA non-discrimination on the basis of disability, the right to request reasonable accommodations/modifications, and instructions on how to make such requests (see discussion of DHCD notice below);
- LHAs must have a written reasonable accommodation/modification policy pertaining to applicants and residents that includes an explanation of the reasonable

¹⁶ 42 U.S.C. §§ 4151 *et seq.*

accommodation/modification request and evaluation processes, as well as of the grievance procedures available upon denial of requests;

- LHAs shall designate an Accommodation Coordinator, which may include an existing staff person, to coordinate efforts to ensure the efficacy of LHA responses to reasonable accommodation/modification requests;
- LHAs must reasonably assist disabled applicants and residents in need of assistance understanding LHA rules, policies, practices, and services and who need assistance understanding and/or completing documents (such as applications, leases, and other forms);
- LHAs should respond to the applicant on reasonable accommodation/ modification requests within 30 days and make a determination on the request in a reasonably prompt manner;
- LHAs that deny a particular reasonable accommodation/modification request must still engage in a reasonably prompt interactive process with the disabled person, or person acting on the disabled person's behalf, to determine alternative reasonable accommodations/modifications;
- LHAs must otherwise ensure compliance with applicable ADA regulations at 28 C.F.R. part 35.

DHCD Modified Documents

The following is a list of modified DHCD documents pertaining to disabled persons that includes clarifying information on certain key changes:

1) DHCD Form Lease for Public Housing:

Language contained in Section XIII, "Reasonable Accommodation or Modification on Account of a Disability," was expanded to clarify that reasonable accommodations/modifications must be provided to ensure full participation in the housing program as well as to ensure equal enjoyment of the leased premises and public or common use areas.

The DHCD Form Lease no longer includes the provision that a reasonable accommodation request shall be in writing. A request for a reasonable accommodation/modification does *not* have to be made in writing. However, it is helpful for the LHA and for the Tenant or household member, or person(s) acting on behalf of the Tenant or Household member, to have written documentation of the request. If the Tenant or household member requires assistance in making a reasonable accommodation request, the LHA must assist the Tenant or household member in doing so. The LHA should document its efforts to enter into an interactive process with the Tenant or household member, or person(s) acting on behalf of the Tenant or household member, to identify potential reasonable accommodations to address the disabled person's needs or limitations, as well as the results of the interactive process.

A reasonable accommodation/modification request also does not need to be made through a particular procedure or through the specific use of the words "reasonable accommodation" or other "magic words." A reasonable accommodation request is regarded as made when the disabled applicant or resident, or person acting on his/her behalf, makes it reasonably clear to the housing provider that the

requested change to a rule, policy, practice, or service, or a physical change to a dwelling or facility, is because of the applicant or resident's disability.¹⁷

2) *“Notice to All Applicants and Residents: Reasonable Accommodations and Modifications are Available for Persons with Disabilities”*

The DHCD Notice regarding reasonable accommodations now specifically includes “residents” language in addition to “applicants.” LHAs must provide all residents and applicants the above referenced Notice as modified.

LHAs are not to require verification or documentation of the existence of a disability if the disability is obvious or otherwise known to the LHA. For example, if a resident is a known recipient of Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) benefits, additional information is not needed to determine the existence of a disability (note that such a determination is distinct from a determination of eligibility for State-Aided Elderly/Handicapped Public Housing discussed below). However, it may be appropriate to request additional information to verify that there is a disability-related need for the requested accommodation.

If the disability-related need for the accommodation/modification is not obvious or otherwise known, the LHA may request additional information to establish that the accommodation/modification is necessary and that there is a relationship between the person's disability and the need for the accommodation.

The Notice no longer includes the provision that medical documentation must be submitted. Verification or documentation of a disability or a disability-related need for the accommodation/modification need not consist of medical records or a certification or verification by a physician. Verification by or the records of an appropriate source of information, including but not limited to a psychiatrist, psychologist, social worker, non-medical service agency worker, or a reliable person that is in a position to know about the individual's disability is usually sufficient.¹⁸

3) *“Request for Reasonable Accommodations and Modifications”*

Changes made to the Request for Accommodations form are consistent with changes made to the aforementioned Notice regarding reasonable accommodations. Additionally, the signature line of said form was modified to include residents, as well as representatives authorized by applicants or residents.

4) *“Verification of Handicapped Status for State-Aided Elderly/Handicapped Housing”*

¹⁷ See *Boston Housing Authority v. Emmitt Bridgewater*, 452 Mass. 833 (2009) (citing the Joint Statement of the U.S. Department of Housing and Urban Development (HUD) and the United States Department of Justice (DOJ) “Reasonable Accommodations under the Fair Housing Act” (May 17, 2004)).

¹⁸ See HUD and DOJ, “Reasonable Accommodations under the Fair Housing Act” (May 17, 2004, Joint Statement).

The Physician's Verification of Handicapped Status for State-Aided Elderly/Handicapped Housing has been modified so as not to require a physician's certification. As discussed above, potential verification sources are not to be limited to physicians only. Verification by or through the records of other professionals to establish that an applicant's disability meets eligibility requirements for State-Aided Elderly/Handicapped Housing is appropriate.

Please find the modified forms listed above at <http://www.mass.gov/dhcd> by searching under "Public Housing Applications & Documentation."

We know that many of you are proud of the ways we are able to provide safe and appropriate environments for the most vulnerable residents of the Commonwealth, and we are hoping that these materials provide you with a legal framework to assist with this important work. If you have any questions or concerns, please feel free to contact us.